No. 82-500

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE SOUTHLAND CORPORATION, et al.,
Appellants,

—vs.—

RICHARD D. KEATING, et al.,
Appellees.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON SECURITIES DIVISION AND THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION

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The State of Washington Securities Division and the North American Securities Administrators Association, and its member states, joining in this motion request leave of this Court to file the attached Amicus Curiae brief in support of the right

of the individual states to legislate in the franchise area in order to prohibit franchisees from pre-dispute waiver of their right to a judicial forum. For the reasons set forth in the attached Amicus Curiae brief, and for the reasons set forth in the Statement of Interest contained in that brief, the State of Washington and the North American Securities Administrators Association and its member states, are concerned that the states' interests will not be adequately presented. This is inherent in the fact that the case involved private party litigants. The states' concerns include the many unregistered franchisees with no bargaining power and the larger question of the state's power to protect its citizens from powerful franchisors. This decision could undermine the ability of the state to see that its citizens have access to its state court where the state

law is more likely to be implemented properly. This decision could effectively cut off legitimate claims by franchisees in our state forced to travel thousands of miles to present their claims. We are vitally interested in an adequate system of dispute resolution within our state when a franchisor has reaped the benefits of selling his interests within the state.

The State of Washington and the North American Securities Administrators Association, and its member states make this motion because Southland Corporation has refused to consent to the filing of this Amicus Curiae brief.

Because the State of Washington's and the North American Securities Administrators Association's interest in this case is so significant, it respectfully files the

Motion for Leave to File the attached Amicus Curiae brief.

Respectfully sbmitted,

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On Appeal from the Supreme Court of California

**BRIEF OF AMICUS CURIAE
SECURITIES DIVISION
STATE OF WASHINGTON
AND THE
NORTH AMERICAN SECURITIES
ADMINISTRATORS ASSOCIATION**

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state franchise act that prohibits pre-dispute waiver of franchisee's right to sue in a court of law?

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STATEMENT OF INTEREST

The Securities Division of the State of Washington, a division of the Department of Licensing, is the office mandated by the Legislature to regulate the offer and sale of securities, franchises, camp clubs and business opportunities in the state. It is a member of the North American Securities Administrators Association, a fifty state group whose aim is to establish national guidelines for securities and franchises which guidelines are later adopted through rulemaking in the various states. The State of Washington is one of thirty-eight states to have adopted the Uniform Securities Act drafted by Professor Louis Loss and adopted by the National Conference of Commissioners on Uniform State Laws. The Franchise Investment Protection Act of the State of Washington is based on both language, structure and purpose to the Uniform Securities Act.

In the instant matter the Washington State Securities Division is concerned with the outcome of this case because it substantially effects the numerous unregistered franchise agreements made in this state. We are concerned that Washington State citizens may be precluded from the protections of the Franchise Investment Protection Act, state police-power legislation, if the appellant's argument prevails. We are concerned that a franchisor, the party in the superior bargaining position, may be able to hide behind the Federal Arbitration Act and use it as a club to cut off the franchisees' rights under Washington law. Acceptance of Southland's arguments would interfere with the critical state interest and policy that Washington has in protecting its citizenry.

SUMMARY OF ARGUMENT

The franchise acts of various states including California contain the same or similar anti-waiver language to that of the Federal Securities Act of 1933, the Federal Exchange Act of 1934 and the Uniform Securities Act which has been adopted by thirty-eight states. The courts, including this court, have consistently held that language to void pre-dispute arbitration clauses. The various franchise acts throughout the country were promulgated for the same purposes as the securities acts, in order to provide sufficient information for the offeree to make an informed investment decision. Because of these similarities the franchise acts should be construed the same to void pre-dispute arbitration clauses.

Antitrust issues have also consistently been held to be nonarbitrable at both the state

and federal level. Many of these cases involve franchisees suing under the Federal Sherman Antitrust Act or one of the various state antitrust acts. In many states a violation of the franchise act is a per se violation of the state antitrust act. There is a parity of purpose behind these acts and there should be an agreement of construction.

Southland contends that a state statute barring arbitration in franchise agreements involving interstate commerce violates the Supremacy Clause of the United States Constitution. Specifically they contend that the Federal Arbitration Act supersedes the anti-arbitration policy of the California Franchise Investment Law. They rely on §2 of the Federal Arbitration Act which essentially provides that written arbitration provisions in contracts evidencing transactions in interstate commerce shall be "valid, irrevocable and enforceable". Section 2

actually goes on to provide that such provisions are valid, etc., "save upon such grounds as exist at law or equity for the revocation of any contract". There appears no indication whatsoever of congressional intent that agreements would be "valid, irrevocable and enforceable" solely by virtue of the Federal Arbitration Act. The purpose of the Federal Arbitration Act as pronounced by its authors was merely to overrule a long-standing judicial precedent against arbitration, not to totally preclude a state from legislating in this area.

The original purpose of arbitration was to speed up access to a decision making body, avoiding the delay and expense of litigation and to provide a more convenient forum to the aggrieved party. In this case none of these purposes would be met. Due to the expense and burden involved, it is unreasonable for the franchisees to pursue their remedy in a far

away location. There is a strong public policy of allowing the state to protect its citizens through legislation. If Southland's argument is accepted, the result will be that many legitimate claims will simply not be pursued.

ARGUMENT

I. SECURITIES ACTS, SIMILAR IN BOTH LANGUAGE AND PURPOSE TO FRANCHISE ACTS, PROHIBIT WAIVER OF JUDICIAL REMEDIES.

The Uniform Securities Act drafted by Professor Louis Loss of the Harvard School and adopted by the National Conference of Commissioners on Uniform State Laws is the model for the securities acts in thirty-eight (38) states. Both Federal and state securities laws were adopted for the general welfare and to protect the public from diversified methods of deceit and fraud in the sale of securities. Terril v. Hoyt, 149 Kan. 51, 87 P.2d 238 (1939); Howell v. First Boston International Corp., 34 N.E.2d 633 (1941); Goodyear v. Meux, 143 Tenn. 287, 228 S.W. 57 (1921); Merrill Lynch, Pierce, Fenner and Smith v. Ware, 414 U.S. 117 (1973).

This adoption was an exercise of the police powers of the state, not an infringement upon any personal or property right guaranteed by the constitution. State v. Simons, 193 Or. 274, 238 P.2d 247 (1951); Investment Reserve Corp. v. Michigan Securities Commission, 238 Mich. 606, 214 N.W. 311 (1927); King v. Commonwealth, 197 Ky. 128, 246 S.W. 162 (1922).

State legislatures in all but two states have enacted some form of franchise regulation. 15 G GLICKMAN, BUSINESS ORGANIZATIONS: FRANCHISING §3.03 - 3.03 [51] (1977). This is true even though "All franchise systems, however capitalized, are susceptible to securities regulation until such time as the franchise is so well established as a system that success or failure is not disproportionally keyed to the success or failure of the other franchises." 1969 Op. GA. Att'y. Gen. 661. See

also Goodwin, Franchising on the Economy: The Franchise Agreement as a Security under Securities Acts, Including 10b-5 Considerations, 24 BUS. LAW 1311 (1969); Comment, The Franchise as a Security: Application of the Securities Laws to Owner-Operated Franchises, 11 B.C. IND. & COM. L. REV. 228 (1970). However, the remedies provided under state securities laws proved to be inadequate for many franchises;[1] therefore, states adopted various franchise regulatory schemes to allay abuses suffered by naive franchise investors at the hands of over-zealous franchisors. "Blue sky" legislation continues to be potentially applicable to franchise offerings, in addition to state franchise legislation.

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[1]Mr. Steak, Inc. v. River City Steak, Inc., 324 F. Supp. 640 (D. Col. 1970) aff'd 460 F2d 666 (10th Cir 1972).

The Federal Securities Act of 1933 (15 U.S.C. §77n) and the Uniform Securities Act are very similar. Both are registration acts, and include similar sections granting exemptions from registration. Both have anti-fraud provisions that apply regardless of registration. Both give the regulators injunctive powers and investigative powers. Most important, both have anti-waiver clauses. See, 15 U.S.C. §77n and Uniform Securities Act §410(g). The anti-waiver section in the Uniform Securities Act was modeled on §77n of the Federal Securities Act of 1933, for the purpose of furthering the Federal-state coordination. The Federal anti-waiver clause, 15 U.S.C. §14 provides that "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of any rules and regulations of the Commission shall be void." The Uniform Securities Act §410(g) contains the same

language except that it refers to "this Act or any rule or order hereunder." As a matter of both policy and statutory construction the language of these anti-waiver provisions "in essence declares that an attempted waiver of the remedy under the Act is void." Merrill Lynch, Pierce, Fenner and Smith v. Moore, 590 F.2d 823, (10th Cir. 1970). In Wilko v. Swan, 346 U.S. 427 (1953) this court applied this reasoning directly to arbitration clauses and concluded that the right to select the judicial forum could not be waived under the anti-waiver language of §77n in the Federal Securities Act of 1933.

While §410(g) of the Uniform Securities Act is not applicable solely to arbitration clauses, it was intended to incorporate the holding of Wilko v. Swan, supra. As Loss, the author of the Uniform Securities Act explained in Loss, Securities Regulation, 1813-1814 (1961):

In 1953, the Supreme Court had to decide whether the non-waiver provisions in §14 of the 1933 Act invalidated a customer's margin agreement which provided that any controversy between him and the securities firm should be determined by arbitration . . . The Supreme Court had concluded that the right to select the judicial forum was the kind of "provision" that could not be waived under §14, because "it is clear that the Securities Act was drafted with an eye to the disadvantages under which buyers labor".

Clearly the draftsmen of the USA intended the anti-waiver language adopted to have the same effect on pre-dispute arbitration clauses as it does in the Federal Securities Act of 1933.

Courts have held that the language in the Federal Securities Act of 1934 likewise voids

pre-dispute arbitration clauses. Merrill Lynch, Pierce, Fenner & Smith v. Moore, 590 F.2d 823 (10th Cir., 1979). That court suggested that

> On this it is necessary to recognize that the policy consideration in the two instances with respect to the two remedies (referring to the Federal Securities Act of 1933 and the Federal Securities Act of 1934) are not different. The purpose of the Rule 10b-5 remedy is to protect the vulnerable purchasers of securities from the aggressive and more sophisticated seller (or buyer). Even though the arbitration proceeding may be faster and less costly to the public and, for that matter to the violator of the contract, the desirability of non-waiver of the remedy would prevail.

Id at 827.

The Third Circuit in Ayres v. Merrill Lynch, Pierce, Fenner & Smith, 538 F.2d 532 (3rd Cir., 1976), cert. denied, 429 U.S. 1010 (1976) was likewise not "persuaded that either the differences between the rights granted in the 1933 and 1934 Acts or any consideration of policy warrant such a distinction" between the 1933 and 1934 Acts. Id. at 536. See also, Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977). Explaining that the purpose of the arbitration bar in the 1934 Act is to insure a complete and reviewable record of the proceedings, the court in Greater Continental Corporation v. Schecter, 422 F.2d 1100, 1103 (2nd Cir. 1970) likewise concluded that 1934 Act violations are "properly litigated in the courts." Congress intended, as did the draftsmen of the Uniform Securities Act, to assure that the purposes of the Securities Act of 1933 and 1934 would be carried out and that sellers would not be able

to maneuver buyers into weakened positions by forcing arbitration. State courts construing the same language from state acts have adopted the same view. See, Sandifer v. Reynolds Securities, Inc., 44 Co. App. 381, 618 P.2d 690 (1980); Sandifer v. District Court, 635 P.2d 547 (Colo. 1981); Kiehne v. Purdy, 309 N.W. 2d 61 (Minn. 1980).

The purpose of the state franchise acts, like that of the Uniform Securities Acts, is the protection of investors. The franchise acts of the various states were enacted "to correct franchise sales abuses such as the sale of franchises with the lack of material information and a lack of bargaining power on the part of the purchasers." Lobdell v. Sugar'N'Spice, 33 Wn.App. 881, 885, 658 P.2d 1267, 1271, (1983). A majority of the franchise law schemes are similar to the Uniform Securities Act and the Federal Securities Act of 1933. Like the

Federal Securities Act and the Uniform Securities Act, many franchise acts require registration, have exemptions from registration, and have anti-fraud provisions that apply regardless of registration.

> Modeled loosely on the new-issue provisions of federal securities and state blue-sky laws and closely on franchise-disclosure statutes in several other states, the act seeks to prevent fraudulent and unsound franchise promotions in Illinois by requiring the franchisor to give prospective franchisees extensive and verified written information . . ., on the background and resources of the franchisor and its principals, the terms of the franchise relationship, and the franchisor's prospects. My Pie Intern, Inc. v. Debould, Inc., 687 F.2d 919, 922 (7th Cir. 1982).

The regulators also have very similar injunction and investigatory powers under these acts. Twenty states have franchise acts with anti-waiver clauses. By using the same or similar language to that of the Federal Securities Acts of 1933 and 1934, the various state legislatures intended to reach the same results as in those Acts and their state counterparts; that is, they intended to protect their citizens and legislatively void waiver of important rights. Unfortunately, the courts have not always carried out this intent. See, Allison v. Medicab International, 92 Wn.2d 199, 597 P.2d 380 (1970); Barron v. Tastee Freeze International, 482 F.Supp. 1213 (E.D. Wis. 1980).

In Allison v. Medicab International Inc., supra, the court held the arbitration clause valid because they felt they had to rely on Pinkis v. Network Cinema Corporation, 9

Wn.App. 377, 512 P.2d 751 (1973). In Pinkis, similar issues had been raised but there had been no anti-waiver clause argument because the Washington Franchise statute became effective in 1972, two years after the date of the franchise agreement. The Pinkis decision was therefore only a contract case and not a statutory case. It involved a question of fraudulent inducement of the entire franchise contract. Allison, on the other hand, did deal with the Washington Franchise Investment Protection Act. The plaintiffs argued 1) the arbitration clause did not apply to statutory claims and 2) the Franchise Investment Protection Act prohibits enforcement of the arbitration clause. The real issue should have been the effect of the anti-waiver clause of RCW 19.100.180(g) upon the enforcement of the arbitration clause and the effect of the Federal Arbitration Act, 9 U.S.C. §1, et seq upon that. Because this important issue was not

discussed by the court, Allison does not stand for the position that a state through legislation can not protect its citizenry from the enforcement of a pre-dispute arbitration clause.

The court in Barron v. Tastee Freeze International, supra, relying heavily on Allison and Romnes v. Bache & Co., Inc., 439 F.Supp. 833 (W.D. Wis. 1977) came to a similar conclusion. The Barron court did consider the anti-waiver language and held that the Federal Arbitration Act applied, thereby nullifying Wisconsin's ability to legislatively void a pre-dispute arbitration clause. Examination of the briefs and transcript of oral argument (January 11, 1980, Case No. 79C-1025 U.S.D.C., Ed. Wis.) in Barron shows that neither party informed the court that no case presented to that court actually dealt with the issue of the impact of the Federal Arbitration Act upon state police power statutes, except

the Allison case. Neither party discussed the defects of the Allison decision. Neither party discussed the history or purpose of either the Federal Arbitration Act or the "anti-waiver" clause of the Wisconsin franchise laws. In Barron Judge Reynolds also relied on his own decision in Romnes as having dealt with the impact of the Federal Arbitration Act upon the "anti-waiver" clause although the Romnes decision clearly avoided that issue. In Romnes Judge Reynolds held that the case related solely to the Federal Commodities Exchange Act with the result that the claims were arbitrable because the Commodities Exchange Act has no "anti-waiver" provision. When the issue of how the same "anti-waiver" language effects the Federal Arbitration Act later came up again in the same Wisconsin District Court in Krogg v. Mait and Paine, Webber, Jackson and Curtis, Inc., F.Supp. (No. 82-C-0363, E.D. Wis., Jan. 7, 1983), Judge Warren, declining to follow

Judge Reynolds' reasoning in Barron, held that the Federal Arbitration Act does not preempt the "anti-waiver" clause of the Wisconsin Uniform Securities Act. That "anti-waiver" clause is substantially identical to the "anti-waiver" clause in the California Franchise Act now before this Court. Judge Warren noted that there is no clear mandate for preemption by the Federal Arbitration Act. He also noted that the state securities statute involves inherent police power, is remedial in nature, and presents a legislatively created cause of action, all of which is true of the case at bar. For the above reasons, neither Allison nor Barron should be viewed as providing cognizable legal reasoning as applicable to the case at bar.

Because this Court has consistently construed the exact language involved in the "anti-waiver" provision of California's franchise

act to nullify pre-dispute arbitration clauses in federal securities cases and the states have done likewise and because franchise acts are so similar in both structure and purpose to those acts, the language should be construed similarly to preclude the use of pre-dispute arbitration clauses.

II. ANTI-TRUST ACTS, SIMILAR IN PURPOSE TO FRANCHISE LEGISLATION, PROHIBIT WAIVER OF JUDICIAL REMEDIES.

A vast majority of the courts seem to agree that both Federal and state antitrust issues are not arbitrable. Wineland v. Marketex International, 28 Wn.App. 830, 627 P.2d (1981); United Nuclear Corporation v. General Atomic Company, 93 N.M. 105, 597 P.2d 290 (1979), cert. denied, 444 U.S. 911 (1979); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); American Safety Equipment v. J. P. Maguire

and Company, 391 F.2d 821 (2nd Cir. 1967); A & E Plastic Pak Co., Inc. v. Monsanto Company, 396 F.2d 710 (9th Cir. 1968). The reason this is so germane is that the purposes behind these statutes are similar to those of the franchise acts. In fact, many of these cases have involved franchisees who sued either under the Federal Sherman Antitrust Act, 15 U.S.C. §1, et seq., or one of the state antitrust acts. In many states a violation of the state franchise laws are also a per se violation of the state antitrust statute.

The purpose of the Sherman Antitrust Act was the "protection of a large segment of the public, frequently in an inferior bargaining position. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the act has been likened to a private attorney-general who protects the public's

interest." American Safety Equipment Corp. v. J. P. Maguire and Co., Inc, supra, at 826. Although that court notes that hundreds of thousands or -"perhaps millions"- of people can be affected in an antitrust case, the fact that not all the cases are that large does not affect the impact of these antitrust cases. Courts construing state antitrust acts have noted that policies underlying the Federal and state antitrust laws are concurrent. United Nuclear Corporation v. General Atomic Company, supra. In United Nuclear Corporation v. General Atomic Company, supra at 311 the court stated, regarding an integrated Federal-state antitrust policy, "The validity of these reasons does not vanish simply by exchanging the Federal judge for one in a state court who is charged with the same responsibility to enforce a strong public policy against monopolistic practices."

Along with the similarity of purpose behind Federal and state antitrust statutes, courts have also recognized the similarity of purpose of the Federal Trade Commission Act which regulates in the franchise area and the Sherman Antitrust Act. In Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1930) the court discussing the Trade Commission Act, the Sherman Antitrust Act and the Clayton Act noted that "The object of the Trade Commission Act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain." (citations omitted) Under the Federal Trade Commission Act if an arrangement constitutes a "franchise" within the meaning of the FTC rules, the offeror is required to make

disclosure irrespective of the absence of state legislation requiring such. 44 Fed. Reg. 49, 966 (1979). The regulations provide that if any state has protective legislation in the franchise area that is "equal to or greater than is provided by the rule" then it is consistent with the acts regulatory scheme. 16 C.F.R. §436.1(a)(24) (1979). No cases exist concerning whether claims charging violation of the Federal Trade Commission Act are proper subjects for arbitration because no private remedy exists under the Act. If it were to arise, the courts would respond that they were not proper subjects for arbitration, because of the policy interests served, by analogizing to such non-arbitrable antitrust enactments, both state and Federal.

The states which have enacted franchise legislation have declared a strong public for doing so. The Arkansas legislature while

promulgating the Arkansas Franchise Act declared that "distribution and sale of franchise agreements in the state of Arkansas vitally affects the general economy of the state, public interest and public welfare . . ." ARK. STAT. ANN. §13. In Shell Oil Co. v. Marinello, 63 N.J. 402, 307 A.2d 598, 602 (1973) the court noted that "Our Legislature in enacting the Franchise Practices Act, has declared that distribution and sales through franchise agreements in New Jersey vitally affect the general economy of the State, the public interest and the public welfare." Because of this widespread public effect and the similarities of purpose of the antitrust acts and franchise acts, if one is inappropriate for arbitration so is the other. In addition, it makes very little sense that, in those states which make it a violation of the state antitrust act to violate the franchise act, the arbitration clause would be enforceable under one act and void under the

other, even though the fact situation is identical.

III. THE HISTORY AND PURPOSE OF THE FEDERAL ARBITRATION ACT

Appellants argue that even though the purposes of the state antitrust and securities acts are the same as those of the Federal, the Federal Arbitration Act preempts state protective legislation. In American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F.2d 811, 815, 816 (6th Cir. 1959) which did not deal with a state police-power statute, the court stated concerning the law of preemption that "Within the scope of the statute circumscribed by the Constitution, Federal law is of course paramount under the Supremacy Clause and State law must give way . . . Federal power to preempt being clear, it remains to inquire just how much of the field

the Congress intended and did occupy." (Emphasis added). The issue before the court in that case was the capacity of a quasi-governmental party to enter into the arbitration agreement, and therefore the validity of the clause. The court stated that the Federal Arbitration Act was passed "merely to overrule by legislation long-standing judicial precedent, which declared agreements to submit judicable controversies to arbitration contrary to public policy, . . ." and concluded that either Federal or state law may control the validity of an arbitration clause. Id. at 816. The operative provision of the Federal Arbitration Act with which the court was concerned was §2 which provides that:

> A written provision in any ** contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ***

> or the refusal to perform the whole or any part thereof *** shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. §2, 61 Stat. 669 (1947).

The court stated:

> As to agreements to arbitrate which although evidencing transactions 'involving' commerce (U.S.C. §§1 and 2), are invalid, revocable or unenforceable under state or Federal law for other reasons, eg. fraud, lack of consideration or capacity or authority to contract, there appears no indication whatever of congressional intent that such agreements would be made valid, irrevocable and enforceable solely by virtue of the Federal Arbitration statute. And it is settled that ambiguous statutory

> language is not to be so read as to give it a reach beyond congressional intent as revealed inter alia by the legislative history, evil to be remedied, and object sought to be achieved.

Id. at 816

In the instant case, appellants argue that anti-waiver language directly conflicts with the Congressional declaration under §2 of the Federal Arbitration Act (Brief of Appellants Pg. 26) even though 1) the plain language of the statute indicates Congress recognized that there may be "grounds as exist at law or in equity for the revocation of any contract", and 2) the legislative history indicates otherwise. In Prima Paint Corporation v. Hood & Conklin, 388 U.S. 395 (1967), a case involving fraudulent inducement of a contract and not a Federal or state statute, Mr. Justice Black in

the dissenting opinion discussed the legislative history of the Federal Arbitration Act. Justice Black, construing that legislative history noted that state police-power acts preclude pre-dispute arbitration clauses.

In Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 51 U.S.L.W. 4156, 4162 (1983) the court discussing Prima Paint stated,

> The issue before us was whether the of fraud in the inducement was itself an arbitrable controversy. We held that the language and policies of [the Federal Arbitration] Act required the conclusion that the fraud issue was arbitrable.

Courts have agreed that if there is fraud involved in the inducement of the arbitration clause itself, the clause would be void. Robert

Lawrence Company v. Devonshire Fabrics, Inc., 271 F.2d 402 (1959), cert. denied, 364 U.S. 801 (1960); National Camera, Inc. v. Love, 644 P.2d 94 (Co.App. 1982). As in Prima Paint, Robert Lawrence involved only common law claims and not the effect of state police-power legislation upon the Federal Arbitration Act. That court concluded that there exist no grounds "at law or in equity" for the revocation of the contract. That is certainly not true of the instant case. The "anti-waiver" clause applicable in this statutory case provides the grounds "at law" to preclude the use of the pre-dispute arbitration clause.

Federal regulation of a field must not be deemed preemptive of state regulatory power absent persuasive reasons. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 rehearing den. 374 U.S. 858 (1963); Allen-Bradley Local No. 111, United Electrical,

Radio, and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942). Even then, when a state exercises its police powers to protect its citizens, and that exercise would be valid if not superceded by Federal action in the regulation of interstate commerce, Congress must clearly manifest its intention to preempt such. International Union, United Auto Workers, A.F. of L., Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949), rehearing den., 336 U.S. 970 (1949). As Chief Justice Lumbard noted in his concurring opinion in Metro Industrial Painting Corp. v. Terminal Construction Co., Inc., 287 F.2d 382 (2nd Cir. 1961), a case between two commercial firms of equal bargaining power, on the issue of whether a particular dispute was covered by an arbitration clause:

> . . . the legislative history of (the Act) reveals little awareness on the part of

> Congress that state law might be affected. . . Having no clear mandate from Congress the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach upon the powers which Congressional policy, if not the Constitution, would reserve to the states." Id at 386.

In light of this lack of a clearly manifested Congressional intent to occupy the field and the attempt of the states through protective legislation to protect its citizenry and maintain their various constitutional rights such as the right to trial by jury, the Federal Arbitration Act should not be construed to preempt the state franchise acts containing the anti-waiver language pertaining to pre-dispute arbitration clauses.

IV. THE STATE HAS A STRONG POLICY TO PROTECT ITS CITIZENS FROM WAIVER OF REMEDIES

As a policy matter, considering the purposes for arbitration, the court should protect the right of the states to prescribe a forum for the citizenry when a foreign company seeks the privilege of selling its products within the state's boundaries. The original purpose of arbitration was to speed up access to a decision making body, thereby mitigating damages and allowing contracting parties to avoid, if they so chose, the "delay and expense" of litigation. American Airlines, Inc. v. Louisville and Jefferson County Air Board, supra, at 816. This original purpose is being turned inside out by exploitive franchisors. Besides merely selecting the forum, use of arbitration clause has the effect of chilling claims. Due to the expense and burden

involved, it is unreasonable for the franchisee to pursue his rights in a far away location. The result is that many legitimate claims are simply not pursued at all. Redress should be facilitated not hampered. When the franchisor avails himself of the privileges of selling his products in a certain state, where the franchisee is located and where all negotiations take place, particularly if the claim is relatively small and the franchisee is greatly disadvantaged in relative bargaining strength, it is simply not fair to compel resolution in a distant forum.

This issue surfaces when a franchisor elects to use an exemption from the registration provisions or violates the act by not registering the franchisee. It is outlandish that a franchisor could circumvent the requirements and force arbitration by violating the law.

Numerous courts argue that there is a strong public policy favoring arbitration. American Airlines, Inc. v. Louisville and Jefferson County Air Board, supra. Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, supra. In Cone the court stated that § 2 of the Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements; notwithstanding any state substantive or procedural policies to the contrary. (Emphasis added) Id. at 4162. There is a strong public policy of arbitration in general which is embodied in the Federal Arbitration Act but the policy of allowing the state to protect its citizens through legislation is also very important and in this case should prevail. The "anti-waiver" clause applicable in this statutory case provides the grounds "at law" to preclude the use of the pre-dispute arbitration clause. It was never intended that the Federal Arbitration Act would

operate to restrict the states' police powers and without clear intent on the part of Congress, it should not be so construed.

CONCLUSION

For all of the reasons stated above, the decision of the California Supreme Court concluding that the California legislature intended to render arbitration agreements unenforceable with respect to claims based upon that statute and that anti-arbitration statutes of that kind do not contravene the federal substantive law embodied in the Federal Arbitration Act should stand.

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